IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 24, 2014 Session

WILLIAM WATTERS, JR. v. NISSAN NORTH AMERICA, INC., ET AL.

Appeal from the Chancery Court for Franklin County
Nos. 18777 & 18778 Jeffrey F. Stewart, Chancellor

No. M2014-00539-SC-R3-WC - Mailed February 13, 2015
Filed March 24, 2015

In this workers' compensation action, the employee alleged that he sustained bilateral thoracic outlet syndrome, bilateral shoulder injuries and a herniated disc in his neck as a result of his work and that he was permanently and totally disabled by those injuries. His employer denied that the neck injury was work-related and denied that he was totally disabled. The trial court found that the neck injury was not compensable and awarded 80% permanent partial disability for the other injuries. On appeal, the employee contends that the evidence preponderates against the trial court's finding concerning the neck injury, and the employer contends that the award was excessive. The appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2013) Appeal as of Right; Judgment of the Chancery Court Affirmed

DON R. ASH, SR. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J. and PAUL G. SUMMERS, SR. J., joined.

Jill T. Draughon, Nashville, Tennessee, for the appellant, William Watters.

Thomas W. Tucker, Nashville, Tennessee, for the appellees, Nissan North America, Inc. and Ace American Insurance Company.

Herbert H. Slatery, III, Attorney General & Reporter; Kathryn A. Baker, Assistant Attorney General, for the appellee, Tennessee Department of Labor and Workforce

Development, Second Injury Fund.

OPINION

Factual and Procedural Background

William Watters ("Employee") was forty-three years old when the trial of this matter took place on August 30, 2010. He attended school through the eleventh grade and later obtained a GED. He began working for Nissan North America ("Employer") in 2002. Prior to that, he had worked in various factories as a machine operator, assembler and loader/unloader. His job at Employer involved assembling engine heads and attaching them to engine blocks.

In the latter part of 2006, Employee began to notice unusual fatigue in his arms and shoulders as he worked. On January 11, 2007, he experienced a sharp pain in his right arm. He reported the incident to his supervisor and was eventually referred to Dr. Blake Garside, an orthopaedic surgeon, for treatment. His medical course after that was long and complex. Dr. Garside first examined Employee on January 17, 2007. Initially, he prescribed physical therapy and work restrictions. Based on those restrictions, Employee was placed in a light duty job operating a "collet retainer" machine. Dr. Garside later referred Employee to Dr. Robert Clendenin, a physical medicine and rehabilitation specialist, to be evaluated for possible thoracic outlet syndrome or cervical spine problems. In March 2007, Dr. Clendenin ordered an MRI and performed an EMG, the results of which were essentially normal. Employee was then examined by Dr. Richard Berkman, a neurosurgeon, in April 2007. Dr. Berkman determined that Employee did not have a surgical lesion in his neck at that time. Dr. Berkman considered Employee's symptoms to be "classic" for thoracic outlet syndrome. Employee continued to work in the collett retainer position, but his symptoms, including a painful pinching sensation between his shoulders, increased until he could no longer continue. His last day of work for Employer was April 11, 2007.

Employee was referred to Dr. Thomas Naslund, a vascular surgeon, in May 2007. Dr. Naslund diagnosed bilateral thoracic outlet syndrome. He performed a left first rib resection (removal of a portion of the first rib) in June 2007. That procedure was only partially successful in relieving Employee's symptoms, and Dr. Naslund recommended against performing a similar procedure on the right side.

Employee returned to Dr. Berkman in September 2007. Dr. Berkman ordered a second MRI of Employee's neck. That study showed a herniated disc at the C6-7 level. Employee was then seen by Dr. Richard Davis, also a neurosurgeon, in November 2007. Dr. Davis performed a discectomy and fusion at C6-7 on January 22, 2008. Initially, this

procedure provided some relief to Employee. However, his symptoms gradually worsened over time. X-rays taken in January 2009 suggested that the two vertebrae had not fused completely. Dr. Davis performed a second surgery in March 2009 in which the vertebrae from C4 to C7 were fused. Employee had improvement of some symptoms, but continued to have significant neck pain. Dr. Davis referred him to pain management in August 2009. Dr. Jeffrey Hazelwood, a physical medicine and rehabilitation specialist, began providing pain management treatment to Employee in October 2009 and continued to do so until the trial occurred.

Employee also returned to Dr. Garside for further evaluation of his shoulder in December 2009. He diagnosed bilateral impingement syndrome. An injection provided temporary relief of Employee's shoulder symptoms. Dr. Garside performed an arthroscopic surgical decompression and distal clavicle resection in February 2010. As with earlier surgical procedures, Employee had some initial improvement, but his symptoms returned. Dr. Garside released him in August 2010 with permanent restrictions.

Employee testified that he operated the collett retainer machine from January 2007 until April 2007. He described the job as follows:

> The collet retainer has two machines on it. It works by pneumatic. It shoots the collets to the retainer itself. The retainer is operated by a vibrating system that gets them sending down a track. And as they go through a certain device, the pneumatic will shoot the collets inside of it, and then it will release it, and it will fall on down the track to where the operator will be at two ends. It would make sure the collet and retainer landed in a tray upright, make sure all the collets were in the retainers. You had a left and a right or front and back, according to how you wanted to look at it.
>
> There's two machines that operated on the same basis, two identical machines. You fill the pans full, set them over on a trail, and you've got you a fresh tray to fill up. It just ran like that. That's what the job consisted of all day.

Employee testified that the machines regularly jammed. When this occurred, it was necessary to stop the machine, open a door and use a screwdriver to loosen the jam. Occasionally, it was necessary to get into the "cage" around the machine to clean up parts that fell to the bottom. Performing these activities required reaching and sometimes placed him in awkward positions. During this time, he developed cramps in his thoracic area and soreness in his arms. By April, his arms were becoming more fatigued, and he began to experience a pinching sensation between his shoulder blades. He ceased to work

at that time and did not return to work for Employer or anyone else thereafter. Employee's supervisor, Chad Steiffel, confirmed that the collett retainer machine jammed frequently during the time Employee was working on that job.

Employee testified that he engaged in many activities, including auto mechanics, yard work, hunting and hiking, prior to his injury. He was no longer able to do any of those things. His said that his wife had repaired the roof of their home and his son had taken over doing the yard work. His activities were limited to folding laundry, operating a small vacuum cleaner and making breakfast. He had to rest after performing any of these activities. He said that his average level of pain was seven on a scale of ten, but sometimes worse than that. He had been a part-time preacher before his injury and continued that activity on a reduced basis. In that role, he visited the county jail and a local nursing home on a regular basis and was occasionally asked to fill in at local churches on Sundays. He took the medications Ultram and Ambien daily. He also sometimes used Percocet when his pain became particularly intense.

Various doctors offered opinions concerning Employee's anatomical impairment, permanent restrictions and causation of his C6-7 herniated disc.[1] Dr. Garside opined that he had a 7% impairment to the body as a whole due to his right shoulder surgery. He restricted Employee from overhead work and overhead lifting. Dr. Naslund opined that Employee had a 30% impairment of the left arm due to thoracic outlet syndrome and surgery. He thought that Employee would have "inabilities or incapabilities based on his own self-imposed limits from residual pain or any weakness[,]" but did not impose any formal restrictions on his activities. On cross-examination, he testified that his training concerning the AMA Guides consisted of a single meeting with a colleague. He did not refer to any particular part of the Guides as the source of his opinion.

Dr. Davis testified that Employee's C6-7 herniated disc was caused by his work. Specifically, he found that "particularly the April [2007] event aggravated a pre-existing degenerative condition" that resulted in the two neck surgeries. He assigned 20% impairment to the body as a whole. During cross-examination, it became apparent that Dr. Davis was unsure whether his opinion about causation was based on the March 2007 or September 2007 MRI.

Dr. Clendenin, who saw Employee in March and April 2007, testified that Employee did not have a herniated disc at C6-7 when he last saw him on April 18, 2007. He based that opinion on the March 2007 MRI and his clinical examinations of Employee. He stated the Employee's findings were consistent with either thoracic outlet syndrome or impingement of the C8 nerve root. Employee's symptoms were consistent

[1] For purposes of this appeal, causation of Employee's bilateral shoulder condition and thoracic outlet syndrome is not disputed.

during his three examinations.

Dr. Berkman testified that Employee "absolutely didn't" have a herniated C6-7 disc when he examined him on April 13, 2007. He was "very comfortable" that Employee's symptoms at that time were not caused by a spine injury. He considered those symptoms to be "classic" for thoracic outlet syndrome, although there were other potential causes. Those symptoms included tingling in the fourth and fifth fingers, which was consistent with either thoracic outlet syndrome or impingement of the C8 nerve root. During cross-examination, Dr. Berkman agreed that Employee had multiple problems with overlapping symptoms which made it difficult to analyze his condition. He added that Employee didn't have symptoms of a C6-7 disc rupture in April 2007. He viewed the ruptured disc shown by the September 2007 MRI as a new problem.

Dr. Berkman saw Employee in March 2009 for a second opinion evaluation about Dr. Davis's proposed second cervical fusion procedure. He recommended against the surgery at that time. The failure of the first procedure, in his view, made it unlikely that another procedure would provide any relief.

Dr. Robert Landsberg, an orthopaedic surgeon, performed an independent evaluation at the request of Employee's attorney on September 19, 2012. Based on the history provided by Employee and his review of the medical records, Dr. Landsberg opined that the C6-7 disc rupture "must have started" in March 2007 based on Employee's description of increased neck and interscapular pain during that period. He assigned permanent impairment as follows: 10% to the body as a whole for left thoracic outlet syndrome, 8% for right thoracic outlet syndrome, 8% to the body as a whole for the right shoulder, 2% to the body as a whole for the left shoulder and 29% to the body as a whole for the cervical fusions. These values combined under the Fifth Edition of the AMA Guides for a 45% impairment to the body as a whole. Dr. Landsberg further opined that Employee was disabled from all activities requiring the use of his arms. On cross-examination, he agreed that Employee reported no particular injury occurring after January 2007 and that he did not know what a cervical MRI taken in May, June or July of that year would have shown.

Dr. David Gaw, also an orthopaedic surgeon, conducted two medical record reviews at the request of Employer's attorney. He initially opined that all of Employee's shoulder, arm, neck and thoracic problems were work related. However, he later changed his opinion concerning the neck, testifying that he had confused the findings of the March 2007 and September 2007 MRIs. He assigned the following permanent impairments: 10% to the body for left thoracic outlet syndrome, 5% for right thoracic outlet syndrome

and 6% to the body as a whole for the right shoulder surgery. The combined value of these impairments is 20% to the body as a whole. On cross-examination, Dr. Gaw stated that, without regard to causation, Employee retained a 29% impairment to the body from the cervical fusions. This combined with the other impairments for a total of 43% to the body as a whole. Dr. Gaw concurred with the recommendations of Dr. Hazlewood, the pain management physician, that Employee "only occasionally use the upper extremities in overhead or outstretched positions for pushing, pulling or lifting, only occasionally getting his neck in awkward positions and avoid lifting more than [ten to fifteen pounds] in an outstretched or overhead position."

Patsy Bramlett, a vocational counselor and consultant, evaluated Employee at the request of his attorney. She administered the Wide Range Achievement Test, which showed that Employee was able to read at a tenth grade level, spell and perform math at a fifth grade level. She assumed that Employee could lift no more than ten pounds and could not work with his arms outstretched or overhead. Based on those limitations, she opined that he was 95% to 100% vocationally disabled as a result of his multiple medical conditions. On cross-examination, she stated that, if Employee was not limited to lifting ten pounds, his vocational impairment would be less. She said that if Employee's restrictions permitted him to perform light duty work, his vocational disability would be approximately 70%.

Michelle McBroom Weiss, also a vocational counselor and consultant, evaluated Employee at Employer's request. Her test results were similar to Ms. Bramlett's, except that Employee was able to perform arithmetic at a tenth grade level. She arrived at differing results for his vocational disability, according to the restrictions suggested by different doctors. Based on Dr. Naslund's restrictions, Employee had 0% vocational disability. Dr. Garside's restrictions resulted in a 37% disability, Dr. Davis's restrictions resulted in a 45% disability, and Dr. Landsberg's restrictions gave a disability of 82% to 100%.

After hearing this evidence, the trial court took the case under advisement. Court was reconvened several weeks later, and findings and conclusions were issued from the bench. The court concluded that Employee did not sustain his burden of proof that his neck injury was caused by his work. It found that he had sustained an 80% permanent partial disability to the body as a whole from his thoracic outlet syndrome and shoulder injuries. Judgment was entered accordingly. Employee has appealed, asserting that the trial court's finding concerning the neck injury was erroneous. Employer contends that the award is excessive.

Analysis

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(e)(2) (2008 & Supp. 2013), which provides that appellate courts must "[r]eview . . . the trial court's findings of fact . . . *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." As the Supreme Court has observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. *Tryon v. Saturn Corp*., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. *Glisson v. Mohon Int'l, Inc./Campbell Ray*, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Causation, Neck Injury

The trial court found "that the evidence is too equivocal and speculative for me to find that [Employee] has sustained either a traumatic or a gradual injury to his neck." Employee contends that the evidence preponderates against this finding. We begin our analysis of this contention by noting that there is no dispute that Employee did not have a herniated C6-7 disc on March 16, 2007, the date of the MRI ordered by Dr. Clendenin. His last day of work for Employer was April 11, 2007. Thus, Employee necessarily takes the position that the herniation occurred between those two dates. He relies first on his own testimony concerning the gradual appearance or increase of symptoms at the base of his neck and between his shoulder blades during this period. He also relies on the medical testimony of Dr. Davis and Dr. Landsberg, based in large part on his account of his symptoms, that the herniation was caused by the job he was performing during that period. He points out that the job, while relatively light, did require reaching several times per hour to clear jams and sometimes placed him in awkward positions. Employee also points out that all of the physicians who testified agreed that his several medical conditions had overlapping symptoms that made definitive diagnosis difficult. We agree that all of these considerations would permit an inference that some kind of nexus existed between his job and the neck injury.

However, causation is ultimately a matter to be determined by examining the expert medical proof. *See Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991)

In that regard, we are constrained to observe that Dr. Davis did not examine Employee until November 2007. Further, his testimony was somewhat compromised by his apparent confusion concerning the March and September 2007 MRIs. Dr. Landsberg saw Employee more than five years after he had ceased to work for Employer and based his opinion largely on Employee's account. On the other hand, Dr. Clendenin and Dr. Berkman both examined Employee within a few days of his final day of work. Each doctor testified that Employee did not have clinical indicia of a C6-7 disc herniation at that time. Further, Dr. Berkman saw Employee again in September 2007. He ordered the MRI that revealed the injured disc. Although he had no direct recollection of the events, he inferred from his clinical notes that the decision to order the second MRI was caused by a change in symptoms between April and September. He stated repeatedly that Employee did not have a herniated disc at the time of his April 13, 2007 examination.

The trial court chose to accept the opinions of the doctors who examined Employee nearest to the time he alleges that his injury occurred over the physicians who saw him months or years later. We conclude that the evidence does not preponderate against the trial court's finding that Employee did not sustain a compensable neck injury.

Excessive Award

Employer asserts that the trial court's award of 80% permanent partial disability for his shoulder injuries and thoracic outlet syndrome is excessive. The crux of its argument is that the trial court considered restrictions imposed due to the noncompensable neck injury in reaching its conclusion. This matter was raised before the trial court in a motion for clarification. In its order disposing of the motion, the court stated:

> [T]hat although the Court mentioned limitations and restrictions concerning [Employee's] neck condition in formulating his assessment of vocational disability in previous findings, the Court clarifies its findings that the Court finds that Dr. Gaw's restrictions were for all of [Employee's] conditions, specifically including, but not limited to the bilateral thoracic outlet syndrome and bilateral shoulder conditions, and therefore the 80% permanent partial disability award is appropriate for the bilateral thoracic outlet syndrome and bilateral shoulder conditions.

We find that this is a fair interpretation of Dr. Gaw's testimony, especially in light of statements contained in his February 2, 2012 letter to Employer's counsel, exhibited to his deposition. Moreover, the restrictions suggested by Dr. Garside, which arise solely from the shoulder injuries, significantly limit employment opportunities for an individual who has worked in factories for almost his entire adult life. And, while Dr. Naslund did not impose any formal restrictions, his testimony clearly reflects the opinion that

Employee is limited in the use of his arms because of the effects of thoracic outlet syndrome. Finally, Employee testified in detail about the difficulty he has using his arms to perform relatively minor tasks. An injured employee's own assessment of his physical condition and resulting disabilities cannot be disregarded. *Uptain Constr. Co. v. McClain*, 526 S.W.2d 458, 459 (Tenn. 1975); *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972) We therefore conclude that the evidence does not preponderate against the trial court's finding that Employee sustained an 80% permanent partial disability to the body as a whole as a result of his compensable injuries.

Conclusion

The judgment is affirmed. Costs are taxed one-half to William Watters and his surety and one-half to Nissan North America, Inc. and Ace American Insurance Company, for which execution may issue if necessary.

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Don R. Ash, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

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Chancery Court for Franklin County
No. 18777 & 18778

No. M2014-00539-SC-R3-WC - Filed March 24, 2015

JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs are taxed one-half to William Watters and his surety and one-half to Nissan North America, Inc and Ace American Insurance Company, for which execution may issue if necessary.

PER CURIAM

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